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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., and JOHN Z., pseudonyms for actual persons,

Petitioners,

-vs-

FRANK J. KELLY, Attorney General for the State of Michigan, and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Attorneys for Petitioners
By: Robert S. Harrison
2401 W. Big Beaver
Suite 325
Troy, Michigan 48084
Telephone: (313) 643-4860

And: Noel P. Keane
930 Mason
Dearborn, Michigan 48124
Telephone: (313) 278-8775

QUESTIONS PRESENTED FOR REVIEW

1. Whether the enforcement of Mich. Comp. Laws Ann. §§710.54 and 710.69 impermissibly intrudes upon the Petitioner's constitutionally protected zone of privacy and the decision of individuals, married or unmarried, to bear or beget children, by denying access to the state's adoption process.

2. Whether the enforcement of Mich. Comp. Laws Ann. §§710.54 and 710.69 results in an unwarranted gender-based discrimination between male and female infertility by prohibiting the practice of surrogate motherhood while allowing artifical insemination by donor.

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The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Michigan issued on August 10, 1982 in this proceeding.

OPINION BELOW

The rejection of Petitioner's application for leave to appeal to the Michigan Supreme Court, reported at 414 Mich. 875 (1982), appears in the Appendix hereto at p. 1a, along with the opinion of the Michigan Court of Appeals, reported at 106 Mich. App. 169, 307 N.W.2d 438 (1981) at p. 2a, and the unpublished opinion of the Wayne County, Michigan Circuit Court at p. 12a. The unpublished informal opinion of Judge James H. Lincoln of the Wayne County, Michigan Probate Court (Juvenile Division) is contained in the Appendix at p. 37a.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 5, 1981. A timely application for leave to appeal to the Michigan Supreme Court was denied on August 10, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws Ann. §710.54 (Supp. 1981) states in pertinent part:

(1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
(a) The placing of a child for adoption.
(b) The registration, recording, or communication of the existence of a person interested in adopting a child.
(c) A release.
(d) A consent.
(e) A petition.

(2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

Mich. Com. Laws Ann. §710.69 (Supp. 1981) provides in pertinent part that:

> A person who violates any of the provisions of Section 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony.

STATEMENT OF THE CASE

John Doe and his infertile wife, Jane Doe, together with Mary Roe, pseudonyms for actual persons, petitioned the Wayne County, Michigan Circuit Court to declare unconstitutional certain sections of the Michigan Adoption Code, Mich. Comp. Laws Ann. §§710.54 and 710.69. Under these statutes, the Does were prohibited from remunerating Mary Roe to conceive and bear a child with John Doe through artificial insemination. In compensation for providing the means for the birth of the biological progeny of Mr. Doe, Mrs. Roe would receive $5,000.00 plus expenses.

The statutes questioned dictate that the parties in the adoption process must file with the Probate Court for approval a sworn statement enumerating any monies or other valuables which passed as consideration between the parties.

Since the language of Mich. Comp. Laws Ann. §710.54(1) does not enumerate the specific charges and fees of which the Probate Court would approve, prior to filing their Complaint for declaratory relief, Petitioners sought an informal opinion from the Probate Court regarding the propriety of giving consideration to a surrogate mother. The Honorable James H. Lincoln, Judge of the Wayne County, Michigan Probate Court (Juvenile Division), refused to permit payment of a fee. (The text of the informal opinion is contained in the Appendix at p. 37a.)

In response to the unfavorable opinion of Judge Lincoln and in light of the unique nature of the concept of surrogate motherhood, Petitioners sought a declaratory judgment to insure that their proposed conduct would not violate the law. Petitioners also sought to enjoin Respondents, Frank J. Kelley, Attorney General for the State of Michigan, and William Cahalan, Wayne County, Michigan Prosecutor, from prosecuting Petitioners under the aforestated statutes.

The Honorable Roman S. Gribbs, Judge of the Circuit Court, Wayne County, Michigan, concluded that the questioned statutes were not constitutionally objectionable.

On Petitioners' appeal of right to the Michigan Court of Appeals the lower court decision was affirmed. The court of appeals held that the Petitioners'

arrangement was not within the realm of fundamental interests protected by the right of privacy. Petitioners' application for leave to appeal to the Michigan Supreme Court was denied without opinion.

REASONS FOR GRANTING WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court Defining The Scope Of The Constitutionally Protected Right Of Privacy.

Mr. Justice Blackmun outlined the origins of the fundamental right of privacy in Roe v. Wade, 410 U.S. 113, 152 (1979).

In Griswold v. Connecticut, 381 U.S. 479 (1965), this Court held that a marital right of privacy was essential to the liberty guaranteed by the fourteenth amendment. Id. at 495.

Mr. Justice Brennan further extended the Griswold parameter of privacy in Eisenstadt v. Baird, 405 U.S. 438 (1972). This court, in the majority opinion, held:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (citations omitted).

In the instant case, the Michigan Court of Appeals affirmed Petitioners' contention that their decision whether to bear or beget a child constituted "a fundamental interest protected by the right of privacy..." Doe v. Attorney General, 106 Mich. App. 169, 173, 307

N.W.2d 438, 441 (1981). The refusal to recognize the zone of privacy to encompass the payment of consideration to a surrogate mother was based on the perception that such an arrangement was merely contractual. Id. at 173-74, 307 N.W.2d at 441.

Michigan courts have thus established what they perceive to be an improper reason for child bearing, a reason stripped of all constitutional protection. This perception is inconsistent with the firm position of this Court in which the right of privacy did encompass the decision of persons, married or single, whether to bear or beget children. In light of this conflict, a Writ of Certiorari is appropriate.

2. This Case Presents An Important Question Of Constitutional Law Which Has Not Been, But Should Be Settled By This Court.

In Carey v. Population Services International, 431 U.S. 678 (1977), this Court stated that:

> [T]he outer limits of the aspect of [personal] privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions [regarding] procreation [and] family relationships...

Id. at 684-85 (citations omitted). As the Court noted in Roe v. Wade, 410 U.S. 113, 155 (1973), where fundamental rights like the right to privacy are involved, the state may only justify regulation of such rights by demonstrating its "compelling interest" in the matter.

The Respondent asserts that prohibiting payment of a fee to surrogate mothers protects the best interests of

the child and prevents "baby bartering." Petitioners respond that the supervision of the Michigan Probate Court over all aspects of adoption proceedings, even without the reporting requirements of Mich. Comp. Laws Ann. §710.54, adequately protects the best interests of the child. Further, the state's concern over "baby-bartering" is inapplicable to the situation where the adoptee's natural parent is a co-petitioner in the adoption proceeding.

Indeed, eight states by statute specifically exclude from judicial scrutiny such payment of monies by adoption petitioners when one of the petitioners is the natural parent of the adoptee. Alaska Stat. §20.15.090(b); Ariz. Rev. Stat. Ann. §8-114(B); Cal. Civ. Code §244r; Fla. Stat. Ann. 63.132(3); Iowa Code Ann. §600.9(1)(d); Nev. Rev. Stat. §127.300(2); N.D. Cent.

Code §14-15-10(2); Okla. Stat. Ann. §866. (The text of these statutes is contained in the Appendix at p. 4la.)

Reimche v. First National Bank of Nevada, 512 F.2d 187 (3d Cir. 1975), reviewed the propriety and enforceability of an adoption contract between the natural parents of an illegitimate child. In upholding the agreement, the court stated that "[t]he fears that approval of such a policy would lead to the bartering or sale of children are not borne out where we deal only with agreements between parents or close family members." Id. at 190; see also, In re Shirk's Estate, 186 Kan. 311, 350 P.2d 1 (1960).

The Michigan Court of Appeals failed to decide whether the state's interest in this matter was a "compelling interest" so as to warrant regulation. This Court is encouraged to grant the instant Petition for Writ of Certiorari

so that this important question of constitutional law can be directly considered and decided by this Court.

3. The Decision Below Is Inconsistent With The Decisions Of This Court Regarding The Constitutionality Of Regulations Which Impose Significant Burdens On The Exercise Of Protected Conduct.

In Carey v. Population Services International, 431 U.S. 678 (1977), this Court held that since the state could not constitutionally ban the use of contraceptives by married or single persons, prohibiting against the dissemination or sale of contraceptives by anyone but a licensed pharmacist was violative of the right of privacy. By denying access to contraceptives, the state was in fact precluding the practice of contraception.

The same reasoning is applicable to the instant case. Under the prohibitions set forth in Mich. Comp. Laws Ann. §§710.54 and 710.69, surrogate mother contracts would rarely occur.

In Carey, the state ban was not total but it burdened access to contraceptives. In Doe v. Bolton, 410 U.S. 179 (1973), this Court held that a statute requiring that abortions be performed only in accredited hospitals was unconstitutional. The Court found the statute to be an unconstitutional burden on a woman's right to an abortion. The state limitation only reduced the opportunity of the petitioning party to exercise her protected right regarding child bearing.

Both in Carey and Bolton, this Court required proof by the state that the challenged requirements served a compelling state interest. Because the

Michigan Court of Appeals declined to determine the nature of the state's interest in this matter, this Court should hold the statutes in question unconstitutional in that the state has not met its burden of proof.

4. The Decision Below Is Inconsistent With The Decision Of This Court Recognizing Gender-Based Discrimination.

In Personnel Administration of Mass. v. Feeney, 442 U.S. 256 (1979), the Court addressed the constitutionality of a Massachusetts statute which granted preference in state job hiring to veterans.

To determine "purposeful discrimination" by the legislature, the Court proposed that, "when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the

statute in question], a strong inference that the adverse effects were desired can reasonably be drawn." Id, at 279.

In their decisions below, the Michigan courts declined to address the gender-based discriminatory impact of Mich. Comp. Laws Ann. §710.54 alleged by Petitioners. Petitioners agree that the statute is gender-neutral on its face, but assert that, as applied, it adversely affects Petitioner Roe and all other women similarly situated. The masculine counterpart to surrogate motherhood, is the "surrogate fatherhood" of a sperm donor in instances of artificial insemination by donor. "Surrogate fatherhood" is lawful in Michigan despite the fact that the semen is usually paid for and the sperm donor assumes none of the risk and burdens assumed by the "ovum donor."

Given the Michigan courts' refusal to address the issue and this Courts' holdings regarding facially neutral, gender-based discriminatory statutes, a Writ of Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the Petitioners hereby respectfully pray that their petition for Writ of Certiorari be granted.

By: Robert S. Harrison
Robert S. Harrison
Co-Counsel for Petitioners
2401 W. Big Beaver
Suite 325
Troy, Michigan 48084
Telephone: (313) 643-4860

And: Noel P. Keane
Noel P. Keane
Co-Counsel for Petitioners
930 Mason
Dearborn, Michigan 48124
Telephone: (313) 278-8775

Dated: November 3, 1982.

APPENDIX

ACTIONS ON APPLICATIONS
414 Mich 875 (1982)

Doe v Attorney General. (Docket No. 67308.) Leave to appeal denied August 10, 1982, Lippett, Harrison, Perlove, Friedman & Zack and Noel P. Keane, P.C., for plaintiffs-appellants. Frank J. Kelly, Attorney General, Louis J. Caruso, Solicitor General, Eugene Krasicky, First Assistant Attorney General, and George M. Elworth, Assistant Attorney General, for defendant-appellee Attorney General. William L. Cahalan, Prosecuting Attorney, Edward Reilly Wilson, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, for defendant-appellee Wayne County Prosecutor. Reported below: 106 Mich App 169.

DOE v ATTORNEY GENERAL
106 Mich App 169 (1981)

Robert S. Harrison and Noel P. Keane, for plaintiffs.

Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, and Eugene Krasicky and George M. Elworth, Assistants Attorney General, for the Attorney General.

William L. Cahalan, Prosecuting Attorney, Edward Reilly Wilson, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, for the Wayne County Prosecutor.

Before: V.J. Brennan, P.J., and M.J. Kelly and D.C. Riley, JJ.

M.J. Kelly, J. In this case, we are asked to declare unconstitutional those sections of the Michigan Adoption Code, MCL 710.54; MSA 27.3178(555.54) and MCL 710.69; MSA 27.3178(555.69), which prohibit the exchange of money or other consideration in connection with adoption and related proceedings. 1/ The

plaintiffs appeal of right from a January 29, 1980, order of the lower court, denying their motion for summary judgment under GCR 1963, 117.2(3) and granting the defendants' own motion under the same rule. The parties are in agreement as to the pertinent facts in this decision.

Jane Doe and John Doe are pseudonyms for a married couple residing in Wayne County. In response to interrogatories posed by the Attorney General concerning the Does' marriage and whether any children were born of the marriage, the Does filed virtually identical affidavits stating the following information:

"2. That he [she] was married in the City of Farmington, Michigan, on August 20, 1965.

"3. That he [she] is the father [mother] of two sons, ages eleven and seven years."

From the nonresponsive answer to question 3, we are unable to say whether the two children were born of the Does' marriage or are adopted.

It is alleged that Jane Doe has undergone a tubal ligation, rendering her biologically incapable of bearing children and that the Does "wish to have a child biologically related to JOHN DOE". Mary Roe is employed as a secretary by John Doe and also resides in Wayne County. The complaint alleges that these parties contemplate and intend to enter into the following agreement:

> "(a) That JANE DOE and JOHN DOE will pay MARY ROE a sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.
>
> "(b) That a licensed physician will conduct the artificial insemination process.
>
> "(c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.

"(d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.

"(e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.

"(f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE".

The agreement also provided that plaintiffs would pay to Mary Roe the sum of $5,000 plus medical expenses. In addition, Mary Roe would be covered by sick leave, pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery.

The Plaintiffs allege that the disputed statutory provisions impermissibly infringe upon their constitutional right to privacy. This right, first recognized in Griswold v Connecticut, 381 US 479; 85 S Ct 1678; 14

L Ed 2d 510 (1965), was more recently described in Carey v Population Services International, 431 US 678; 97 S Ct 2010; 52 L Ed 2d 675 (1977). In Carey, the Court specifically held that the decision "whether or not to bear or beget a child" was among those protected by the constitutional right of privacy. 2/ See also Harris v McRae, 448 US 297; 100 S Ct 2671; 65 L Ed 2d 784 (1980) ("The constitutional underpinning of Wade [Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973)] was a recognition that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life".)

While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, see Maher v Roe, 432 US 464; 97 S Ct 2376; 53 L Ed 2d 484 (1977), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe from having a child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child -- i.e., its right to support, intestate succession, etc. We do not perceive this goal as

within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

The Plaintiffs also allege that the state has no compelling interest sufficient to justify the prohibitions embodied in the disputed statutes and, in addition, that the provisions are drawn too wide to reflect any legitimate state interests in this area. Our disposition of the foregoing issue, however, renders consideration of this issue unnecesary.

Affirmed.

FOOTNOTES

1/ The statutory provisions sought to be declared invalid provide:

"Sec. 54. (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:

"(a) The placing of a child for adoption.

"(b) The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.

"(c) A release.

"(d) A consent.

"(e) A petition.

"(2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any part in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

"(3) To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 of the Public Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or

indirectly, led to placement of the person for adoption."

"Sec. 69. A person who violates any of the provisions of sections 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony."

2/ The Carey Court summarized those previous decisions in which the right of privacy prohibited unwarranted governmental interference or regulation and which compelled the Court's conclusion as to the right to bear children:

"Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' Roe v Wade, 410 US 113, 152 [93 S Ct 705; 35 L Ed 2d 147] (1973). This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.' Whalen v Roe, 429 US 589, 599-611 [97 S Ct 869; 51 L Ed 2d 64] (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, Loving v Virginia, 388 US 1, 12 [87 S Ct 1817; 18 L Ed 2d 1010] (1967); procreation, Skinner v Oklahoma, 316 US 535, 541-542 [62 S Ct 1110; 86 L Ed 1655] (1942); contra-

ception, Eisenstadt v Baird, 405 US [438], at 453-454 [92 S Ct 1029' 31 L Ed 2d 349 (1972)]; id., at 460 463-465 (White, J., concurring in result); family relationships, Prince v Massachusetts, 321 US 158, 166 [64 S Ct 438; 88 L Ed 645] (1944); and child rearing and education, Pierce v Society of Sisters, 268 US 510, 535 [45 S Ct 571; 69 L Ed 1070; 39 ALR 468] (1925); Meyer v Nebraska, [262 US 390, 399; 43 S Ct 625; 67 L Ed 1042; 29 ALR 1446 (1923)].' Roe v Wade, supra, at 152-153. See also Cleveland Board of Education v LaFleur, 414 US 632, 639-640 [94 S Ct 791; 39 L Ed 2d 52] (1974)." 431 US 678, 684-685.

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF WAYNE

JANE DOE, JOHN DOE,
and MARY ROE, JANE X.,
JANE Y., JOHN Y., JANE Z.,
AND JOHN Z., pseudonyms
for actual persons,

Plaintiffs,

-vs-

Hon. Roman S. Gribbs
C.A.# 78 815 531 CZ

FRANK J. KELLEY,
Attorney General for
the State of Michigan,
and WILLIAM L. CAHALAN,
Wayne County Prosecutor,

Defendants.

OPINION DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On May 15, 1978, plaintiffs filed a Complaint for Declaratory Judgment in the Wayne County Circuit Court. Motions for summary judgment are brought by

plaintiffs and defendants pursuant to GCR 1963, 117.2(3).

FACTS

The facts in this case are not in dispute. Plaintiffs, Jane and John Doe, are husband and wife. Jane Doe is biologically incapable of bearing children. The Does are joined in their complaint by Mary Roe.

The Does propose to have Mary Roe conceive a child with John Doe through artificial insemination administered by a physician. After birth, the Does would take custody of the child once he or she leaves the hospital; and Mary Roe would consent to the adoption of the child by the Does. Mary Roe would receive $5,000, plus medical expenses, from the Does for surrendering custody of her child to the Does and for consenting to the adoption.

In addition, Mary Roe will be covered by sick leave pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery.

The statutes whose constitutionality if involved in this matter are MCLA 710.54 and MCLA 710.69. The former provides, as follows:

> "Sec. 54. (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
> "(a) The placing of a child for adoption.
> "(b) The registration recording or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
> "(c) A release.

"(d) A consent.
"(e) A petition.
"2. Before the entry of the final order of adoption the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.
"(3). To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 of the Public, Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in

> informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or indirectly led to placement of the person for adoption."

MCLA 610.69 provides:

> "Sec. 69. A person who violates any of the provisions of sections 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony."

Plaintiffs' suit seeks to have these statutes declared unconstitutional by this Court and to enjoin defendants from prosecuting plaintiffs for proceeding with the plan outlined above.

DISCUSSION

Plaintiffs' constitutional challenge is basically two-pronged. Plaintiffs first urge that MCLA 710.54 is void for vagueness. Second, that the arrangement

proposed by plaintiffs is within the constitutional "right of privacy." Contained within that second contention are the propositions that the government does not have a compelling interest to invade that area of privacy and that the statute as drawn is not sufficiently narrow.

I.

This Court does not agree with plaintiffs' first contention that MCLA 710.54 is void for vagueness. Plaintiffs are correct in asserting that a statute is violative of due process if it proscribes conduct in terms so vague that a person of common intelligence must guess at the statute's meaning. Connally v General Construction Co., 269 US 385, 70 L Ed 322, 46 S Ct 126 (1926).

The dangers involved in the existence and enforcement of a vague statute are set forth by Mr. Justice Marshall in Grayned v City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S. Ct 2294 (1972) as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc

> and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basis first amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked."

In Grayned, Justice Marshall also enunciated a problem involved in all statutes, even those not void for vagueness. "Condemned to the use of words, we can never expect mathematical certainty from our language."

In a footnote to Grayned, the Court cited American Communications Assoc. vDoreds, 339 US 382, 94 L Ed 925, 70 S Ct 674 (1950), in which the Court stated:

> "There is little doubt that imagination can conjure up hypothetical cases in which

> the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

The statute in the instant case is as specific as is necessary to give fair notice to those to whom the statute is directed.

Plaintiffs question the explicitness of the phrase "or other consideration or thing of value" used in the statute. Even standing alone, this phrase is sufficiently specific to give fair notice to persons of reasonable intelligence what things may not be given in connection with the acts or items listed in (a)-(e) of MCLA 710.54(1). The meaning of that phrase is even more

specifically defined when it follows the only specific item listed, money. The well-established principle of ejusdem generis is pertinent to plaintiffs' contention of statutory vagueness. As the Court stated in diLeo v Greenfield, 541 F 2d 949 (1976):

> "Where general terms in a statute follow an enumeration of terms with specific meaning, the enumeration of terms with specific meaning, the general terms can be expected to apply to matters similar to those specified." (Citations omitted)

It is not necessary that the statute list all conceivable items of value to be constitutionally specific.

II.

Plaintiffs' second basis for urging the constitutional infirmity of the statutes is that they invade plaintiffs' constitutional right of privacy and

further that the statutes do not comply with the requirements of compelling state interest and the narrow drafting required of statutes regulating an act within the right of privacy. Before addressing the latter two points, it must first be determined that plaintiffs' proposed agreement is within the constitutional right of privacy.

That there exists a fundamental right of privacy is well established. The origins of this right were set forth in Roe v. Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973), as follows:

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or

> zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." (Citations omitted)

In stating that only "fundamental" rights are included within the right of privacy, Roe acknowledged that activities relating to marriage, procreation, contraception, family relationships and child rearing and education are included in the guarantee of personal privacy.

The right which plaintiffs assert is specific, narrow and is not of the same personal nature that the constitutional right of privacy protects. Plaintiffs only attack the sections of the Michigan Adoptive Code that prohibits the exchange

of money or other valuable consideration. Although plaintiffs seek to exclude governmental interference with reference to a portion of the adoption statutes, they do not want to exclude the government altogether. They wish to avail themselves of other portions of the Michigan Adotpion Code in order to effect a legal adoption. Plaintiffs intend to utilize other protective provisions of the adoption law; i.e., total control of the child's welfare as legal parents, preserving the rights of inheritance of the child, etc. The right to adopt a child based upon the payment of $5,000 is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the Court) are not constitutionally infirm.

It is this Court's opinion that a contract to use the statutory authority of the Probate Court to effect the adoption of a child wherein such contract provides for valuable compensation, is not deserving of, nor is it within the constitutional protection of the right of privacy as defined by the many cases of the United States Supreme Court.

III.

Although the foregoing makes further discussion unnecessary, this Court will assume, arguendo, that the constitutional right of privacy does apply to the plaintiffs and proceed to the ancillary issues.

First, even if the constitutional right of privacy is applicable, such right is not absolute. It must be considered against important state

interests in regulation. Roe v Wade, supra. In determining the constitutionality of regulations, the Roe Court set forth the following test:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (Citations omitted)

The State's interest expressed in the statutes at issue here is to prevent commercialism from affecting a mother's decision to execute a consent to the adoption of her child. Although the case is distinguishable on the facts from the present case, the statement of the general rule by the Supreme Court of Kansas in In re Shirk's Estate, 350 P 2d 1 (1960), is applicable here.

> "Consequently, this controversy resolves itself down to the question whether the contract with respect to the mother's rights violated public policy. It is fundamental that parents may not barter or sell their children nor may they demand pecuniary gain as the price of consent to adoptions. This is so inherent in the fabric of American law that citation of authority is unnecessary."

"Baby bartering" is against the public policy of this State and the State's interest in preventing such conduct is sufficiently compelling and meets the test set forth in Roe.

Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community.

It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all states. The brief of the Attorney General cites this elementary rule in 67A Parent and Child, §16, p 201-202, as follows:

> "Parents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sole or otherwise disposed of." (Footnotes omitted)

The leading and recognized authority on Contracts, Professor Samuel Williston, writes that bartering for a child is and has been against public policy. He states in 15 Williston on Contracts, #RD Edition, Section 1744A, p 88:

> "The sovereign has an interest in a minor child held superior even to that of the parent;

> hence, there is public policy against the custody of such a child becoming a subject of barter." (Footnote omitted)

The Attorney General cogently argues that contracts for "surrogate gestation" are against public policy. He quotes the Executive Director of the Program in Law, Science and Medicine in Yale Law School, who stated:

> "In any case, the sale of children is illegal in all states; therefore, any contract by which a host-mother is paid a fee in excess of expenses to gestate the unborn child is likely to be held unenforceable as against public policy. That being the case, the 'foster' or gestating mother would presumably be considered by most courts the natural mother of the child since she and not the donor-mother was willing to go through the inconvenience, discomfort, and dangers pregnancy and childbirth.
>
> "It is highly unlikely that a judge, faced with a conflict between two women, one of whom

> has delivered the child and the other of whom 'should' have done so by normal means but who was too busy or disinterested, would resolve the issue of which is the true mother in any way other than by awarding parental status to the host-mother, contracts to the contrary notwithstanding.
>
> "Second, by statute in many states any adoption release executed by the natural mother before the birth of a child is invalid. Even in those states that do not declare parental surrenders to be absolutely void, courts appear to take a dim view of the validity of an adoption release signed prior to the birth of the child." Holder, Legal Issues in Pediatrics and Adolescent Medicine (John Wiley & Sons, 1977) pp 7, 8.

The evils attendant to the mix of lucre and the adoption process are self-evident and the temptations of dealing in "money market babies" exist whether the parties be strangers or friends. The statute seeks to prevent a money market for the adoption of babies.

APPENDIX

The defendant prosecuting attorney concedes that the plaintiff natural mother (Roe) and the plaintiff couple (Doe) are free to "conceive a child, bear it, and raise it as they agree among themselves because these acts are guaranteed by the right to privacy." The defendant prosecuting attorney argues perceptively when he asks: How much money will it take for a particular mother's will to be overborne, and when does her decision turn from "voluntary" to "involuntary."

In their brief and in oral argument plaintiffs vigorously argue that they are in this Court motivated by good will and with the best of intentions seek the Court's approval of their proposed course of action. The prosecuting attorney pointedly responds as follows:

"Plaintiffs seek to convince this court that the 'surrogate' mother would [act] out of altruistic rather than pecuniary motives. If that were so, no monetary payment would be necessary because under MCLA 710.54 she can still be reimbursed for fees and expenses. What plaintiffs seek is to provide her with a sum of money ($5,000) over and above the reasonable expenses she has incurred. Even if some of this money goes for legitimate expenses unrecognized by MCLA 710.54, the fact remains that the primary purpose of this money is to encourage women to volunteer to be 'surrogate' mothers. Plaintiffs have initiated this lawsuit because few women would be willing to volunteer the use of their bodies for nine month if the only thing they gained was the joy of making someone else happy by letting that couple adopt and raise her child. Thus, contrary to plaintiffs' exhortations, in all but the rarest of situations, the money plaintiffs seek to pay the 'surrogate' mother is intended as an inducement for her to conceive a child she would not normally want to conceive, carry for nine

> months a child she would not normally want to carry, give birth to and then, because of this monetary reward, relinquish her parental rights to a child that she bore."

The personal desires and intentions of plaintiffs are not in question, and their good faith is conceded. Nonetheless, public policy is established to guide all of the people of this State, of whatever intent.

A desire to change the established stated public policy that meets constitutional muster is properly addressed to the legislature and not to the courts.

IV.

As to the second part of the Roe test, it is the opinion of this Court that the statutes here in question are drawn sufficiently narrow so as to comply

with the test. The statute must be drawn so as to express only the legitimate interest of the State and no other. If other interests, as well as the State's compelling interest, are regulated by the statute, then the statute must fall. Here the statute is aimed at preventing compensation as consideration involving an adoption proceeding.

Plaintiffs urge that their arrangement is not the type of action which the statute contemplated or intended to proscribe. The fact that this is not a contract among strangers, or that one of the adoptive parents would also be a natural parent, does not alter the fact that the action prohibited interjects compensation in an adoption proceeding; that money, beyond court-approved charges and fees, must be

paid to the biological mother before the parties will strike an agreement.

The statute is clear in expressing the public policy of this State that all persons involved in offering, giving or receiving anything of value in connection with an adoption are controlled by the statutes proscriptions. Neither the relationship of persons involved nor the arrangements between the parties are an exception but clearly all such actions are proscribed.

CONCLUSION

For the above-stated reasons, it is the conclusion of this Court that MCLA 710.54 and 710.69 do not violate the provisions of the Constitution. In addition, it is clear that there exists no genuine issue as to any material fact. Accordingly, pursuant to GCR 1963,

117.2(3), plaintiffs' Motion for Summary Judgment must be DENIED and defendants' Motion for Summary Judgment must be GRANTED as a matter of law.

Pursuant to the provisions of GCR 1963, 522, counsel are to present a proposed judgment consistent with this opinion within ten days of this date.

/s/
ROMAN S. GRIBBS
Circuit Court Judge

DATED: January 28, 1980
Detroit, Michigan

APPENDIX

WAYNE COUNTY JUVENILE COURT
1025 E. Forest Avenue
Detroit, Michigan 48207
Telephone 833-4400

March 2, 1977

To: Miss Margaret Pfeiffer

From: Judge James H. Lincoln

Re: Artificial insemination case. Mr. Noel Keane, Attorney

Here is the situation.

We were requested by Mr. Keane to respond to the following questions:

FIRST: A married couple suitable for adoptive parents wish to adopt a child. The wife cannot have a child. The husband would be used to artificially inseminate a non-related woman.

Would the child born as a result of this arrangement be considered as related to the adopting parents so that the adopting parents could file with the Court for adoption without going to an adoption agency?

ANSWER: My answer is yes! After considerable study and consultation I would hold that it makes no difference what means is used to impregnate a woman. The father is the person who produced the sperm that impregnated the woman. He could even be held liable for support.

SECOND: Could the adopting parents pay the woman for having the child or consenting to its adoption?

ANSWER: No! The law clearly forbids this.

THIRD: Could the adopting parents pay the expenses of the pregnancy delivery - medical - hospital - doctor - transportation to hospital - attorney fees, etc.?

ANSWER: Yes! The law permits this and it has been the custom of all Michigan Probate Court to allow the payment of such expenditures.

I personally would not be concerned with permitting payment of reasonable costs of transportation to hospital, etc., etc. I do not care about the manner of transportation as long as the expense was actually incurred.

Of course I would not approve giving a car, etc. That could be regarded as paying the woman. Nor would I permit payment of lost wages.

Mr. Keane wants me to approve expenditures as they arise.

COMMENT:

I will probably not be the Judge who handles this adoption. The petition may not be filed until after the child is born - this will be early in 1978.

The Judge who handles the case will make all the rulings and will determine what expenses to approve or disapprove.

All that I can do is to give my opinion on all of these matters.

My opinion is not binding on the Judge who will hear the petition.

I appreciate the fact that Mr. Keane wishes to clear all matters for his clients prior to proceeding and I wish I were in a position to give him something other than what I would do if I were handling the petition.

/s/
JAMES H. LINCOLN
EXECUTIVE JUDGE
JUVENILE DIVISION

JHL:gm

Other Statutes Cited:

Alaska's Adoption Code §20.15.090 entitled "Report of petitioner's expenditures" provides in subsection (b):

> This section does not apply to an adoption by a step-parent whose spouse is a natural or adoptive parent of the child.

Arizonia's Adoption Code §8-114 entitled "Report of petitioner's expenditures; exception" provides in subsection (B):

> This section does not apply to an adoption by a stepparent whose spouse is a natural or adoptive parent of the child.

California's Adoption Code §224r entitled "Accounting of Expenditures in Connection with Birth of Child" provides in pertinent part:

> The provisions of this section shall not apply to an adoption by a stepparent where one natural or adoptive parent retains his or her custody and control of the child.

Florida's Adoption Code §63.132 entitled "Report of expenditures and receipts" provides in subsection (3):

> This section does not apply to an adoption by a stepparent whose spouse is a natural or adoptive parent of the child.

Iowa's Adoption Code §600.9 entitled "Report of expenditures" provides in subsection (1)(d):

> The provisions of this subsection do not apply in a stepparent adoption.

Nevada's Adoption Code §127.300 entitled "Penalty for receipt of compensation by unlicensed person for

placing, arranging placement of child" provides in subsection (2):

> The natural parents and the adoptive parents are not accomplices for the purposes of this section.

North Dakota's Adoption Code §14-15-10 entitled "Report of petitioner's expenditures" provides in subsection (2):

> This section does not apply to an adoption by a stepparent whose spouse is a natural or adoptive parent of the child.

Oklahoma's Trafficking In Children Statute §866 provides in pertinent part:

> Provided however, that this provision shall have no application to the parent or guardian of the child nor to a person bringing said child into this state for the purpose of adopting the same into his own family.

82-897

Office-Supreme Court, U.
FILED
DEC 23 1982
ALEXANDER L. STEVAS
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., AND JOHN Z., pseudonyms for actual persons,
Petitioners,

-v-

FRANK J. KELLY, Attorney General for the State of Michigan, and WILLIAM L. CAHALAN, Wayne County Prosecutor,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT WILLIAM L. CAHALAN, WAYNE COUNTY PROSECUTOR

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County State of Michigan

EDWARD REILLY WILSON
Counsel of Record
Deputy Chief, Civil and Appeals

By: TIMOTHY A. BAUGHMAN
Principal Attorney
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5794

JURISDICTION

Respondent disagrees with Petitioners' statement of jurisdiction. Since the matter involves the constitutionality of a state statute attacked and upheld by the state courts, jurisdiction is by **appeal** under 28 USC 1257 (2), and not by certiorari under 28 USC 1257 (3).

REASONS FOR DENYING THE WRIT

NO PROVISION OF THE UNITED STATES CONSTITUTION CREATES A LEGALLY COGNIZABLE PROPERTY INTEREST IN A BABY ON THE PART OF THE NATURAL MOTHER OR FATHER.

Citing numerous cases from this Court, e.g. **Roe v Wade,** 410 US 113 (1979); **Griswold v Connecticut,** 381 US 479 (1965); **Eisenstadt v Baird,** 405 US 438 (1972); and **Carey v Population Services International,** 431 US 678 (1977), petitioners contend that MCL 710.54, which prohibits the offering, giving, or receiving of money or any other consideration in connection with the placing of a child for adoption, the registration or communication of the existence of a person interested in adopting a child, or obtaining a release, consent, or petition (with a criminal penalty for violation, MCL 710.69), is "inconsistent with the decisions of this Court defining the scope of the constitutionally protected right of privacy." An examination of these cases demonstrates that in citing them in support of their position petitioners are grievously wounded in the house of their friends.

The crux of petitioners position lies in the claim that the zone of marital privacy recognized by this Court as existing within the concept of liberty as embodied in the due process clause of the Fourteenth Amendment includes a right for a natural father (as an artificial insemination donor) and his spouse to purchase from the natural mother her legal rights to her child (and concommitantly a right in the natural mother to sell her interest in her child), so that the state may not interfere.[1] But the cases cited by Petitioners from this Court reveal that there is no such constitutionally recognized property right of natural mothers and fathers in unborn (and even unconceived) children.

[1]Respondent does not wish to be understood as agreeing that the Fourteenth Amendment creates any substantive rights which are immune from regulation by the state, be they rights of privacy or rights to life or property. Indeed, respondent marvels that it can be said that there exist "zone of privacy" liberty interests which the state may not impair (e.g. the "right" to abortion after the first trimester) while at the same time a person's **most** fundamental right, his right to life, **may** be taken by the state so long as the process given is that which is due (a fair trial) and the law does not offend a specific guarantee of the Constitution—the Eighth Amendment. Were this Court writing on a clean slate respondent would urge that the Fourteenth amendment does not prohibit the state from depriving an individual of **any** liberty interest, including his life, so long as the proper process (the "law of the land") is given. The state's power in this regard is limited by the police power concept; that is, certain conduct or interests are beyond regulation in falling without the police power of the state because no public interest can rationally be said to be involved. But any conduct subject to regulation under the police power of the state may be regulated under the Fourteenth Amendment, the question being the nature and quality of the process which is due in the particular circumstance.

The abortion decisions of this Court, Roe v Wade, supra; Doe v Bolton, 410 US 179 (1973); **Planned Parenthood of Missouri v Danforth,** 428 US 52 (1976); **Maher v Roe,** _____US_____, 65 LEd 2d 784 (1980); **Bellotti v Baird,** 443 US 622 (1979); **Harris v McRae,** _____US_____, 65 LEd 2d 784 (1980); **H.L. v Matheson,** _____US_____, 67 LEd 2d 388 (1981), clearly demonstrate that the concern of the Court, and the interest protected by the Fourteenth Amendment, is one of privacy regarding the **decisions** involved in conceiving, bearing, and raising a child. No property interest is involved; indeed, because the abortion decision is viewed as a privacy decision belonging to the mother, the natural father has **no rights whatever** in the decision to abort, let alone any property right. Nor is the right given the mother because of some cognizable property interest in the fetus/child, but because of the involvement of her own body in the biological process. Because petitioners seek to sell and buy legally recognizable **custodial** in-

terests of a mother and her child, and because there is no constitutionally protected property interest in children, petitioners attack on the statue must fail.

2. PETITIONERS' RIGHT OF PRIVACY TO CONCEIVE, BEAR, AND RAISE A CHILD DOES **NOT** INCLUDE A RIGHT TO PAY A FEE TO A NATURAL MOTHER IN EXCHANGE FOR HER CUSTODIAL RIGHTS IN HER CHILD.

Respondent disagrees with petitioners' **unfounded extension** of the right of privacy in family matters as recognized by this Court to include the **right** to use the public statutory adoption process but to pay a fee to the natural mother in exchange for her custodial rights in her child. The state clearly has the authority under its police power to establish the requirements for adoption. Adoption exists **only** by statute, and the object is to change the succession of property of persons dying intestate and create the relations of paternity. **In re Sessions' Estate,** 70 Mich 297 (1988). While contracts for the adoption of children are not considered as opposed to public policy, an adoption contract **cannot be enforced unless it complies with the laws of the state.** In **re Garlow's Estate,** 313 Mich 402 (1946); **Westbrook v Elder,** 464 Mich 138 (1933). Unless consent is obtained as required by statute, the adoption is invalid. **Slattery v Hartford-Connecticut Trust Company,** 254 Mich 671 (1931).

Petitioners' wish to invoke the statutory adoption process, but do not wish to comply with one of its requirements. Consequently they selectively attack one of its provisions, MCL 710.54, and its accompanying penal provision, MCL 710.69, as unconstitutional. Respondend submits that the statutory adoption code does not infringe on petitioners; rights to privacy in conceiving, bearing, and raising children. Clearly the petitioner natural mother, and the petitioner couple, are free to

conceive a child, bear it, and raise it as they agree among themselves because these acts are guaranteed by the right to privacy. What they **cannot** do is proceed to the **public forum of the courtroom** and use the public statutory process without complying with **all** the statutory requirements.

> In **Harris v McRae** this Court emphasized that although government may not place obstacles in the path of a woman's exercise of her freedom of choice, **it need not remove those not of its own creation.** Indigency falls in the latter category. (Empasis added). 65 LEd2d at 804.

Respondent suggests that infertility, also, is **not** of the state's creation, and the state, therefore, has no duty to rectify a woman's physical inability to have children. There is no fundamental right to **adopt** a child, nor to give up a child for adoption in exchange for a fee; these are not "liberty" interests protected by the due process clause of the Fourteenth Amendment. See **Harris v McRae,** 65 LEd2d at 805.

For this reason the "rational relationship" test applies, not the "compelling state interest" test, and the cases cited by petitioner are inapplicable.[2] If **any** rational relationship can be observed between the harm to the public sought to be cured and conduct proscribed, the legislation will be upheld by the courts. The legislation herein challenged easily passes the rational relationship test: There is a rational relationship between prohibiting a person from receiving any money or consideration beyond a reasonable recompense for fees and expenses incurred in giving up parental rights and assuring that the courts through the adoption process do not become a market for the production and placement of babies. **See Harris v McRae,** 65 LEd2d at 809.

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[2]But see footnote 1.

3. EVEN IF THE STRICTER COMPELLING STATE INTEREST IN EMPLOYED, THE STATE HAS A SUBSTANTIAL COMPELLING INTEREST WHICH OUTWEIGHS ANY FUNDAMENTAL RIGHTS POSSESSED BY PETITIONERS REGARDING THE STATUTORY ADOPTION PROCESS.

Although respondent maintains no fundamental right is involved, assuming arguendo this Court were to find petitioners did have some fundamental right to privacy which extended to their decision to employ the state's statutory adoption process, respondent contends that using the balancing test of **Roe v Wade, supra,** there is a compelling state interest which outweighs petitioners' rights to privacy.

The state has a duty to maintain the integrity of its court system. Adoption exists only by statute. Adoption falls within the authority of the probate court. It would destroy the integrity of the courts to allow a judge to rubber-stamp and enforce a private agreement for one party to give money or other consideration to a woman in order to have her conceive a child, give birth, and relinquish her parental rights. Petitioners seek to convince this court that the "surrogate" mother would act out of altruistic rather than pecuniary motives. If that were so, no monetary payment would be necessary, as under MCL 710.54 the mother could be reimbursed for fees and expenses. What petitioners seek is to provide her with a sum of money ($5,000) over and above the reasonable expenses she has incurred. Even if a portion of this money went for legitimate expenses unrecognized by MCL 710.54, the fact remains that the primary purpose of this money is to encourage women to volunteer to be "surrogate" mothers. Petitioners have initiated this lawsuit because few women would be willing to volunteer the use of their bodies for nine months if their only gain was the joy of making someone else happy by letting that couple adopt and raise her child. This, contrary to petitioners'

exhortations, in all but the rarest of situations, the money petitioners seek to pay the "surrogate" mother is intended as an inducement for her to conceive a child she would not otherwise wish to conceive, carry for nine months a child she would not normally wish to carry, give birth to a child she would not normally wish to give birth to, and then, because of the monetary regard, relinquish her parental rights to this child. Respondent contends that the blanket prohibition of MCL 710.54 is necessary to prevent the inducement of a woman to become a "surrogate" mother by leading her to believe she will receive a sum of money as agreed upon in a private agreement, only to be denied that amount by the judge at the adoption proceeding if he believes that money unjustified. The blanket prohibition prevents development of **any** market for the production of babies. Further, a state officer, a judge, should not be put in the position of determining what sum is reasonable as a **price** for custodial rights; the state's courts should not be setting or rubber-stamping the price of babies. It is not the court's business to determine that one child is worth more than another child and establish the reasonable rate for a child of a beautiful mother as opposed to a homely mother; for a child of an intelligent mother, as opposed to the child of a dim-witted mother; or for different genetic traits. The integrity of the court system of the statutory adoption process demands that the court be absolutely prohibted from engaging in this conduct.

Another compelling state interest is to protect women who, because of their poverty or other personal circumstances, would have their will to bear a child, or to keep a child they have borne, overcome by the inducement of money or other consideration.

A court might believe the best interests of the child are with its natural mother (despite a better economic status in the prospective adoptive couple), but agree to the adoption solely because of the natural mother's expressed rejection of parental rights (which results from the monetary inducement). It is not for the court in each separate case to determine the motivation for her deci-

sion, how much money it would take for that particular natural mother's will to be overborne, and whether her decision is "voluntary" or "involuntary." Since only recompense for reasonable fees and expenses incurred is permitted under MCL 710.54, it is relatively simple for the court to determine whether the natural mother is acting voluntarily in relinquishing her parental rights. Thus, the blanket prohibition greatly facilitates the court's determination of the best interests of the child by making it simpler to assess the natural mother's true feelings toward parenthood.

Although respondent has not exhausted the list of compelling reasons for justifying MCL 710.54 and 710.69, (and see brief of co-respondent), respondent believes the above stated reasons clearly establish compelling state interests in enacting these provisions which outweigh any privacy rights possessed by petitioner regarding the statutory adoption process.

4. MCL 710.54 and 710.69 DO NOT DENY EQUAL PROTECTION OF THE LAW.

The equal protection clause prohibits gender classifications in statutes unless the classification serves important governmental objectives and is substantially related to achievement of those objectives. **Personnel Administrator of Massachusetts v Feeney**, 442 US 256 (1979). The instant legislation applies to any "person" seeking to employ the state's adoption process. It does **not** classify according to gender. If the law is neutral on its face, as are MCL 710.54 and 710.69, the court must determine if the purpose can be traced to a historically discriminatory purpose. **Feeney, supra.** In **Feeny** the Supreme Court upheld veteran's preference statutes—neutral on their face—despite the fact that in practice those statutes discriminated against women because they were less likely to be veterans. It ruled that where nothing shows enactment to accomplish a collateral goal of gender discrimination, there is no constitutional violation because there is no purpose to discriminate on the basis of sex.

> Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. when the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. (Citation omitted). The calculus of effects, the manner in which a particular law reverberates in a society, is a **legislative and not a judicial responsibility.** 442 US at 271-272 (emphasis added)

There is no discriminatory purpose in the instant legislation. It applies **equally to everyone** to prohibit the offering, giving, or receiving of money or any consideration in connection with the statutory adoption process. See also **Harris v McRae,** 65 LEd2d at 808. Both the mother and the father have parental rights. See **Caban v Mohammed,** 441 US 380 (1979). **Neither** may receive money in connection with giving up their parental rights. If the practical effect is that the provision applies more often to one gender rather than the other, so be it. There is no constitutional denial of equal protection.

5. THE PETITION IS OUT OF TIME

Respondent adopts co-respondent's argument that the refiled petition is jurisdictionally out of time.

CONCLUSION

WHEREFORE, respondent requests that the petition be denied, or if treated as an appeal, the appeal be dismissed for want of substantial federal question.

Respectfully submitted

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN—P24381
Principal Attorney,
Research, Training and Appeals
12th Floor; 1441 St. Antoine
Detroit, Michigan 48226
Phone: 313-224-5794

Date: December 16, 1982

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-897

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., and JOHN Z., Pseudonyms for actual persons,

Petitioners,

v

FRANK J. KELLEY, Attorney General for the State of Michigan and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT KELLEY, ATTORNEY GENERAL, IN OPPOSITION

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
(Counsel of Record)

Eugene Krasicky
First Assistant Attorney General

George M. Elworth
Assistant Attorney General

Michael J. Moquin
Assistant Attorney General
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

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QUESTION PRESENTED FOR REVIEW

I.

MAY THE STATE OF MICHIGAN CONSTITUTIONALLY PROHIBIT ADOPTION OF A CHILD-TO-BE-CONCEIVED THROUGH A PURCHASE OR SALE AGREEMENT WHEREIN THE ACTUAL MOTHER RECEIVES CONSIDERATION FOR HER PROMISE TO CONCEIVE BY ARTIFICIAL INSEMINATION, BEAR, AND DELIVER TO THE OFFERORS SUCH CHILD?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-897

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., and JOHN Z., Pseudonyms for actual persons,

Petitioners,

v

FRANK J. KELLEY, Attorney General for the State of Michigan and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

OPINIONS BELOW

The Opinion of the Circuit Court for the County of Wayne, Michigan, granting Respondents' Motion for Summary Judgment and dismissing Petitioners' Complaint for Declaratory Relief, was entered January 28, 1980 (Petitioners' App at 12a-36a). The Circuit Court's decision was affirmed by written opinion of the Michigan Court of Appeals on May 5, 1981, and is reported at 106 Mich App 169; 307 NW2d 438 (2a-11a). On August 10, 1982, the highest court of the state, the Michigan Supreme Court, denied Petitioners' Application for Leave to Appeal the decision of the Michigan Court of Appeals. See 414 Mich 875 (1a).

While Petitioners have exhausted their state court appeals, the decision of the state court being reviewed by certiorari is that of the Michigan Court of Appeals. The Michigan Supreme Court has held (*Frishett* v *State Farm Mutual Automobile Insurance Co*, 378 Mich 732, 733 (1966)) that where

it enters an order denying leave to appeal, such action "'imports no expression of opinion upon the merits of the case'", citing this Court's decision in *United States* v *Carver*, 260 US 482, 490 (1923) with respect to the effect of denial of a writ of certiorari by this Court.

Accordingly, the instant petition for a writ of certiorari should properly be treated as being directed to the Court of Appeals for the State of Michigan. See *Callender* v *Florida*, 383 US 270 (1966).

JURISDICTION

Respondent is not satisfied with Petitioners' presentation, for the reason that Respondent believes that this "substitute" petition, filed on or about December 1, 1982, and back-dated by the Clerk for docketing as of November 8, 1982, is not a "new and proper" copy "promptly substituted" under Rule 33.7. Accordingly, as further set forth as the first argument in "Reasons for Denying The Writ", Respondent believes the instant petition is not timely for purposes of this Court's jurisdiction under Rule 20.2 and 28 USC § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent is satisfied with Petitioners' presentation, with the following two exceptions: Michigan Compiled Laws Annotated § 710.54 (1) (b); MSA 27.3178(555.54) (1) (b) is not fully set forth at page 3 of the petition. The complete statutory provision, with the language omitted by Petitioners underlined, reads:

> "(b) The registration, recording, or communication of the existence of a *child available for adoption or the existence of a* person interested in adopting a child."

Secondly, the petition (at pp 4-5) does not quote the third (and final) sub-section of Michigan Compiled Laws Annotated § 710.54; MSA 27.3178(555.54) (3) which states:

> "(3) To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 of the Public Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or indirectly, led to placement of the person for adoption."

COUNTERSTATEMENT OF THE CASE

On May 15, 1978, Petitioners Jane and John Doe, husband and wife, and Mary Roe, pseudonyms for actual persons, filed a complaint for declaratory action in the Circuit Court for the County of Wayne, Michigan. The Petitioners sought a declaration that certain provisions of Michigan Compiled Laws §§ 710.54 and 710.69; MSA 27.3178(555.54) and (555.69) are unconstitutional. The challenged provisions prohibit the exchange of money or other consideration in connection with adoption and related proceedings (App at 2a, 14a-16a). The Michigan Court of Appeals in its opinion quoted from the Petitioners' complaint for declaratory action:

> "'(a) That JANE DOE and JOHN DOE will pay MARY ROE a sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.

"'(b) That a licensed physician will conduct the artificial insemination process.

"'(c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.

"'(d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.

"'(e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.

"'(f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE'.

"The agreement also provided that plaintiffs would pay to Mary Roe the sum of $5,000 plus medical expenses. In addition, Mary Roe would be covered by sick leave, pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery."
(App at 4a-5a).

During discovery proceedings in the trial court, Petitioners Jane and John Doe acknowledged that they were married in 1965, and were the parents of two sons (App at 3a-4a); the record does not disclose whether the children were of the marital union, or adopted. Petitioners further alleged that Jane Doe had undergone a tubal ligation so that she was biologically incapable of bearing children (App at 4a and 13a). The Does proposed to have Petitioner Mary Roe, a secretary employed by Mr. Doe, conceive a child by physician-administered implantation of Mr. Doe's sperm (artificial insemination).

The trial judge characterized Petitioners' constitutional challenge as being two-pronged: first, urging that Michigan Compiled Laws Annotated 710.54; MSA 27.3178(555.54) is void for vagueness, and that the Petitioners' proposed arrangement falls within the constitutional ambit of the "right of privacy." (App at 16a-17a). The trial court rejected the vagueness challenge (App at 17a-21a). Next, the trial court held that the right which the Petitioners sought to assert is not within the realm of the constitutional guaranty of privacy, stating:

> "The right to adopt a child based upon the payment of $5,000 is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the Court) are not constitutionally infirm." (App at 24a).

Next, the trial court assumed for the sake of argument that the fundamental right of privacy is affected by the statutes, and reviewed their operation under the "compelling state interest" test set forth in *Roe* v *Wade*, 410 US 113, 156 (1973) (App at 26a). The trial court stated that the statutes satisfy the two elements of the *Roe* v *Wade* test. First, the "compelling state interest test" is met by the state's interest in prohibiting "baby bartering" under the statute (App at 27a) and by preventing "a money market for the adoption of babies." (App at 30a). Secondly, the court stated that the statute was drawn in a sufficiently narrow manner "preventing compensation as consideration involving an adoption proceeding" (App at 34a) and "[t]he statute is clear in expressing the public policy of this State that *all* persons involved in offering, giving or receiving anything of value in connection with an adoption are controlled by the statutes proscriptions." (App at 35a). In so stating, the trial court re-

jected Petitioners' claim that their proposed contract is not within the statutory proscriptions, opining "[t]he fact that this is not a contract among strangers, or that one of the adoptive parents would also be a natural parent, does not alter the fact that the action prohibited interjects compensation in an adoption proceeding . . ." (App at 34a-35a). Accordingly, the trial court granted Respondents' Motion for Summary Judgment (App at 35a-36a) and entered its order dismissing Petitioners' action on February 19, 1980.

The Michigan Court of Appeals affirmed on May 5, 1981 at 106 Mich App 169 (App at 2a-11a). The Court of Appeals squarely addressed, and rejected, Petitioners' contention that the statutes "impermissibly infringe[d] upon their constitutional right to privacy." (App at 5a). After discussing numerous decisions of this Court involving the right of privacy, the Michigan Court of Appeals held:

> "While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, see *Maher* v *Roe*, 432 US 464; 97 S Ct 2376; 53 L Ed 2d 484 (1977), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child—*i.e.*, its right to support, intestate succession, etc. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.
>
> "The plaintiffs also allege that the state has no compelling interest sufficient to justify the prohibitions em-

bodied in the disputed statutes and, in addition, that the provisions are drawn too wide to reflect any legitimate state interests in this area. Our disposition of the foregoing issue, however, renders consideration of this issue unnecessary.

"Affirmed." (App at 7a-8a).

Thereafter, Petitioners filed a timely application for leave to appeal with the Michigan Supreme Court, requesting the Court to invoke its discretionary review of the Court of Appeals decision. The Michigan Supreme Court denied leave to appeal on August 10, 1982; 414 Mich 875 (App at 1a).

REASONS FOR DENYING THE WRIT

I.

THE INSTANT "SUBSTITUTE" PETITION FILED PURSUANT TO RULE 33.7 IS NOT A "NEW AND PROPER" COPY OF THE PRIOR, NON-CONFORMING PETITION FILED NOVEMBER 8, 1982, AND THUS THE PRESENT PETITION IS UNTIMELY FOR PURPOSES OF THIS COURT'S JURISDICTION UNDER RULE 20.2 AND 28 USC § 2101(c).

On August 10, 1982, the Michigan Supreme Court denied Petitioners' application for leave to appeal the adverse decision of the Michigan Court of Appeals. On or about November 8, 1982, and within the 90-day period for invoking this Court's certiorari jurisdiction under 28 USC § 1257(3), Rule 20.2 and 28 USC § 2101(c), Petitioners filed with the Supreme Court Clerk their printed petition dated November 3, 1982. A copy of the petition was received by Respondent Kelley on November 9, 1982, and work began on preparing the brief in opposi-

tion for filing within 30 days, pursuant to Rule 22. On November 29, 1982, Respondent Kelley sent his brief to the printer. Three days later, on December 2, 1982, Mr. Keane, co-counsel for Petitioners, served three copies of the printed petition upon state court counsel for Respondent. That counsel mailed the three printed petitions to Respondent's counsel who is preparing the response in opposition in this Court; the petitions were received on December 7, 1982, after final changes in Respondent Kelley's brief had been approved. On that same day, Respondent's federal counsel discovered, after reviewing a copy of the petition received on December 2, that the petition differed in material respects from the initial petition received on November 9, 1982. The printer was immediately contacted, ordered to stop final printing of Respondent Kelley's brief which had commenced earlier, and instructed to return the proof brief.

Respondent's counsel then contacted the Clerk of this Court, who advised that the initial petition had been returned to Petitioners' counsel under Rule 33.7 because of certain defects. The second set of printed briefs had been received on December 1 or 2 and had been back-dated for docketing purposes under Rule 33.7 to November 8, 1982. Respondent's counsel was advised his brief was due 30 days after receipt of the substitute petition.

Supreme Court Rule 33.7 provides:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: *the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.* If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions

> including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument." [Emphasis added.]

In commenting on Rule 33, Professor Moore states that

> ". . . judicial administration gains more from the formal ground rules than it loses." 13 Moore's Federal Practice and Procedure, SC33-7, ¶ 833.01[3].

Specifically referring to Rule 33.7, *supra*, Professor Moore concludes:

> "If form is to play any role in the processing of cases before the Court[1] [omitted] (and it does), then there must be sanctions to coerce compliance, for without sanctions compliance would be largely limited to the conscientous and careful practitioners. And while we believe these would constitute most of the Supreme Court bar, a small number would indulge in unnecessary deviations from prescribed methods and forms. That seems to be the premise underlying paragraph .7 of R 33." 13 Moore's, *supra*, SC33-20, ¶ 833.09.

The printed petitions filed with the Clerk on December 1 or 2 appear to go much further than merely "cleaning up" deficiencies in the format and appendix, consistent with Rule 33.7.

The instant petition is a substantial revision of the initial petition in the following illustrative respects. Two questions are now presented, as opposed to four questions in the initial petition. In the table of citations, one case previously cited is now omitted, and several non-Michigan statutes are now cited. As to constitutional provisions at issue, the First Amendment is

no longer cited. In the appendix portion, the pagination of the appendix differs from that of the initial petition (due to typesetting). The Order of the Wayne County Circuit Court, which appeared as appendix 26-27 in the initial petition, is now omitted from the appendix. Pages 41a-43a of the instant petition cite provisions of several non-Michigan statutes, which did not appear in the initial petition's appendix. With respect to the portion captioned Opinions Below, the instant petition has added as new language the last sentence thereof. The Statement of the Case portion is different, with rephrasing of language, addition of new language and omission of language cited in the initial petition.

Thus, it should be apparent that the instant petition represents something much more than bringing certain formal defects in the initial petition into compliance with Rule 33. In many respects it constitutes submission of a new petition, and not a mere "substitution" for a non-complying petition which relates back for purposes of docketing under Rule 33.7.

Therefore, the Court, in the exercise of its discretion under the second sentence of Rule 33.7, should deny the instant petition for the reason that it does not "relate back" to the date of the initial but defective filing, and, thus, is out of time under Rule 20.2 and 28 USC § 2101(c). Further, should the Court deny the writ for the reasons set forth in this argument, or for the reasons set forth in the arguments which follow, it is requested that the Court impose upon Petitioners those additional expenses which have been incurred by Respondent Kelley (and presumably by Respondent Cahalan) in recalling and revising the final proof copy of their briefs in opposition (to the initial petition) so as to adequately respond to the changes required to be made in response to the instant petition.

II.

THE ACTIONS PROPOSED BY THE DOES AND MARY ROE OF PURCHASING AND SELLING AN ADOPTION CONSENT MAY BE PROHIBITED BY THE STATE OF MICHIGAN.

Petitioner Doe's privacy claim is based on the argument that the proposed contractual arrangement is their individual prerogative, free of any State interference, to bear and beget children and to have and raise a family.[1] On various occasions, as noted by the Michigan courts in this case, this Court has stated that the having of children and the raising of a family are fundamental personal rights. *E.g., Griswold* v *Connecticut*, 381 US 479 (1965); *Carey* v *Population Services Int'l*, 431 US 678 (1977); *Maher* v *Roe*, 432 US 464 (1977).

However, an examination of the proposed transaction discloses that Petitioners seek to engage in other activities which go far afield from the having of one's own children and the raising of one's own family. To briefly review what each of the Petitioners desire:

(1) *John Doe, husband of Jane Doe*:

> He wants to deliver his semen to a doctor, who will then implant the semen in Mary Roe ("artificial insemination"). He wants to pay Mary Roe $5,000 for an adoption consent severing all legal ties to the child.

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[1] The Does have 2 children, although the record is not clear whether they were born of the marital union or were adopted. See Michigan Court of Appeals Opinion, App at 3a-4a.

(2) *Jane Doe, wife of John Doe*:

> She also want to pay Mary Roe to give up her child by adoption.

(3) *Mary Roe, secretary to Mr. Doe*:

> She wants to be paid by the Does for her agreement to consent to their adoption of her yet unborn natural child before the child is conceived. Mary Roe would retain rights to visit her child at the Does' both before and after the adoption by the Does (see Revised Answers to Respondent Attorney General's Trial Court Interrogatories, No. 11(q) (4) and No. 11(r), at p 4).

Petitioners argue that in matters of marriage, sexual intimacy, and family life, a constitutional right of privacy or "personal autonomy" should permit them to be "let alone" to do as they wish without any interference by the State. In fact, however, Petitioners are not complaining of interference by the State. Rather, Petitioners seek the intervention of the Michigan Probate Court into their relationships—to legitimize the natural child of John Doe and Mary Roe, to declare that this child is adopted by the Does, and to sever Mary Roe's legal ties as the natural mother. The Michigan adoption process with its applicable rules (including the prohibition against payment of consideration set forth in MCLA 710.54; MSA 27.3178(555.54)) in no way involves uninvited state interference in areas of sexual intimacy or family life in which there is a legitimate expectation of State non-involvement.

There is no fundamental right either to adopt or to specify the terms of adoption of one's child. State adoption laws provide an orderly mechanism for the care and protection

of children and their natural parents in those cases where the natural parents are unable or unwilling to assume the parental obligations and privileges of caring for and raising one's children. These laws are a proper exercise of the State's police power for health, safety, and the general welfare. The constitutional standard for laws enacted in the exercise of the police power has been summarized as follows:

> "'To justify a State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" *Goldblatt* v *Hempstead*, 369 US 590, 594-595 (1962).

As noted in *New York ex rel Silz* v *Hesterberg*, 211 US 31, 39 (1908), subject to constitutional limitations, a state legislature is authorized to pass measures for the protection of people in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.

The following purposes, interests, and goals are served by Michigan's statutory prohibition of payments to the natural mother in connection with her consent to an adoption; and these public purposes are applicable to the transaction proposed by the Petitioners as well:

(1) Prohibition against a commercial market for babies —whether involving an unwed mother facing the agonizing decision of retaining or surrendering her child, a woman arranging to conceive a child anticipating a sale of that child or in performance of an agreement to conceive a child, or as a result of a contract for her participation in an extra-marital union to bear the proposed adoptive father's child.

(2) The best interests of the child.

a. natural parents should decide what is best for the child, with adoption as an option of last resort, without being influenced or coerced by offers of money.

b. avoidance of any economic incentive or reward for giving up a child for adoption.

c. avoidance of possibly traumatic discovery by the child of being separated from his or her mother through adoption under the terms of a monetary arrangement agreed upon before conception.

(3) Recognition of the inestimable, intrinsic worth of each person.

(4) Protection of family and marriage relationships from disruption through the wife and/or mother becoming involved in conceiving and bearing a child for some adoptive father in a monetary arrangement, or in anticipation of a commercial market for adoption.

(5) Avoidance of conflicting claims of parental rights and custody.

a. natural mother might renegotiate the fee by withholding consent to adoption, or resist if the probate court reduces the fee to be paid to her.

b. natural mother might resist adoption either before or after it is ordered out of guilt or out of the strong bond which quickly develops between mother and child.

c. conflict and uncertainty of those caring for the child over the status of the child would be detrimental to the child's development.

The detailed statutory system of having court approval of payments to the natural mother permits the payment of reasonable hospital and medical expenses connected with the birth of the child, as noted by Probate Judge Lincoln in his advisory memorandum of March 2, 1977 concerning these matters (App at 37a-40a). At the same time, MCLA 710.54(2); MSA 27.3178(555.54) (2) authorizes the probate judge to disapprove any payment to the mother which would improperly influence her or make the child an object of commerce. Such statutory regulation is neither oppressive nor arbitrary, and it has been correctly declared to be constitutional by the lower courts in this case.

Petitioners also argue that while the Michigan adoption code prohibitions "are gender-neutral on their face" (page 16 of Petition for Certiorari), the prohibitions have a disproportionate impact on Petitioner Roe and other women who want to surrender their children to adoption for a stipulated fee. Petitioners attempt to base this argument (not presented in the trial court or in the Court of Appeals, and raised for the first time in their Application for Leave in the Michigan Supreme Court[2] on cursory speculation as to the prevalence and legality of the sale of sperm to sperm banks which then disseminate it to physicians for artificial insemination. However, Petitioner Roe, as the proposed natural mother in the

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[2]

Accordingly, this issue (Petitioners' *Questions Presented* No. 2 (p i) and No. 4 of *Reasons for Granting Writ* (pp 15-17) does not properly arise from the record before the trial court and the decision of the Michigan Court of Appeals. *E.g., Tyrrel* v *District of Columbia,* 243 US 1 (1916).

transaction described by Petitioners, is not seeking to sell ovum to an "ovum bank"; rather, she is seeking to conceive and bear a child and then turn over that child of hers for adoption by others for a negotiated fee. Accordingly, this argument of Petitioners as to gender discrimination should be rejected as being without merit.

III.

THE PROHIBITION AGAINST PAYING A NATURAL MOTHER FOR CONSENTING TO THE ADOPTION OF HER CHILD IS SUFFICIENTLY NARROW IN ITS SCOPE.

Even if Petitioners are correct (which is not conceded) in asserting that the proposed transaction involves fundamental rights[3], the applicable constitutional test as set forth in *Zablocki* v *Redhail*, 434 US 374, 388 (1978) involving the right to marry would be satisfied:

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The Michigan Adoption Code does not interfere with the right of the Does to have a child or to raise a family. In fact, the Does already have two children. The Adoption Code does not prevent the Does or any couple from having their own children, through their own intimate union with each

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[3] The trial court indicated that Petitioners' allegations did not involve any fundamental rights (App at 23a-25a). The Court of Appeals reached the same conclusion in its opinion, affirming the trial court's opinion (App at 7a-8a).

other. The Does' inability to have further children arises from Mrs. Doe's physical condition, not from anything in the Adoption Code.

Likewise, Mary Roe is not prohibited from having further children, in or out of wedlock, by the Adoption Code.

Thus, whatever fundamental rights may be found here, if any, they are not substantially interfered with by the Adoption Code. Mary Roe will consent to the adoption of her proposed natural child *provided* she is paid to do so, but this adoption consent is subject to important State interests. The interests of the State in prohibiting the payment of money to Mary Roe to induce her to give up her child have been demonstrated above—the prevention of a commercial market for babies, the best interests of the child, a recognition of the child's intrinsic worth, the protection of family and marriage relationships, and the avoidance of conflcting claims of parental rights to custody.

Further interests of the State are in the protection of the mother from duress and overreaching—such as would be potentially involved in the employer/employee relationship as in the proposed transaction or in any case where one party has influence over the other. Another consideration is that the child would already be brought into the world before any of the terms of this type of transaction would be reviewed by the probate court, so that the probate court would be presented with an accomplished event.

The challenged prohibitions in the Adoption Code are sufficiently tailored in that they are applicable only to those persons involved in adoption proceedings and relate only to payments and expenses connected with adoption.

In light of the various State interests advanced by the prohibition against fees for adoption consents, and the absence

of any State interference with fundamental rights, Petitioners' argument that §§ 54 and 69 of the Michigan Adoption Code are unconstitutional should be rejected as being without basis.

IV.

THE PAID-FOR ADOPTION AGREEMENT PROPOSED BY PETITIONERS IS VOID AS BEING AGAINST PUBLIC POLICY.

A discussion of public policy serves to demonstrate the strong State interests which are involved in this area.

The general doctrine that contracts against public policy are void is well summarized in *Mahoney* v *Lincoln Brick Co*, 304 Mich 694, 705; 8 NW2d 883 (1943):

> "'The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.'"

In applying this general rule, the Michigan Supreme Court has held, for example, that marriage broker contracts are void as being against public policy. *Attorney General* v *Marital Endowment Corp*, 257 Mich 691; 242 NW 297 (1932). In that case the Court refused to recognize the handling of marriage promotion contracts as a valid corporate purpose.

The Court recognized the corrosive effect of involving monetary considerations in matrimony at 257 Mich 694-695 as follows:

> ". . . The plan is calculated to promote and to induce on financial grounds marriage of the members. This commerce in marriage is, on the part of the defendant, in practical effect, the promotion of marriage between third persons, its members and others, and tends to marriage through mercenary considerations. This is against public policy. *Antcliff* v *June*, 81 Mich. 477 (10 L.R.A. 621, 21 Am St. Rep. 533).
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> • • •
>
> "'Anything which induces parties to enter into the marriage relation through mercenary considerations strikes at the very foundation of human society, and is necessarily injurious to the community . . . .'"

Another application of the public policy doctrine in the area of marriage is found in the case of *Graham* v *Graham*, 33 F Supp 936, (ED Mich, 1940), wherein an agreement by the wife to support the husband in exchange for his agreement to quit his employment so as to be able to travel with his wife was held to be unenforceable as contrary to public policy. The court relied on the Restatement of the Law of Contracts, § 587, which states:

> "A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal." 33 F Supp at 938.

Certainly the obligations of married persons to mutual fidelity and exclusively in sexual relations are as essential to matrimony as is the obligation of spouses to mutual support.

Another public policy consideration is the fundamental principle that children cannot be bought and sold. This elementary rule is stated in 67A CJS *Parent and Child*, § 16, p 201-202, as follows:

> "Parents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." (Footnotes omitted).

15 *Williston on Contracts*, 3d Edition, § 1744A, p 88, states:

> "The sovereign has an interest in a minor child held superior even to that of the parent; hence, there is a public policy against the custody of such a child becoming a subject of barter." (Footnote omitted)

In discussing the related problem of *in vitro* fertilization and implantation of a donor embryo in a second woman, the Executive Director of the Program in Law, Science and Medicine at Yale Law School, opines that contracts for "surrogate gestation" are likely to be held non-enforceable and among her reasons cites the following:

> "In any case, the sale of children is illegal in all states; therefore, any contract by which a host-mother is paid a fee in excess of expenses to gestate the unborn child is likely to be held unenforceable as against public policy. That being the case, the 'foster' or gestating mother would presumably be considered by most courts the natural mother of the child since she and not the donor-mother was willing to go through the inconvenience, discomfort, and dangers of pregnancy and childbirth.

"It is highly unlikely that a judge, faced with a conflict between two women, one of whom has delivered the child and the other of whom 'should' have done so by normal means but who was too busy or disinterested, would resolve the issue of which is the true mother in any way other than by awarding parental status to the host-mother, contracts to the contrary notwithstanding.

"Second, by statute in many states any adoption release executed by the natural mother *before* the birth of a child is invalid. Even in those states that do not declare prenatal surrenders to be absolutely void, courts appear to take a dim view of the validity of an adoption release signed prior to the birth of the child." Holder, *Legal Issues in Pediatrics and Adolescent Medicine* (John Wiley & Sons, 1977) pp 7, 8.

Petitioners often refer to Mary Roe's proposed role as being that of a "surrogate Mother." This jargon serves to gloss over the fact that Mary Roe is the real mother, and Jane Doe would be the substituted (or surrogate) mother if she were permitted to adopt the child.

Petitioners attempt to distinguish their case from baby selling situations by pointing out that John Doe would be the natural father of the child, who is the subject of the monetary transaction. The fallacy in Petitioners' argument is that at the time the contract is entered, John Doe will *not* be related to the child, since the child does not yet exist. Petitioners' calculated, clinical proposal defies comparison with situations where the custody and care of a child must be worked out by the parents, married or unmarried, who had the child in the course of their human non-commercial relationship.

An additional reason from a public policy standpoint why this agreement would be unenforceable is its potential for duress and overreaching through the exploitation of various relationships, such as the employment relationship in this case between Mr. Doe and Mary Roe, and any other situation where one party has some control or authority over the other. See *In Re Allon*, 356 Mich 586; 97 NW2d 744 (1959), wherein the Court upheld the consent of a mother to the adoption of her child where there was no showing of the mother being subject to duress or overreaching.

The proposed contract is likewise unenforceable because the subject matter is likely beyond the Probate Court's competence to adjudicate. For example, if Mary Roe refused to perform, no court would grant specific performance by ordering her to accept artificial insemination, and conceive, bear, and deliver the child as promised. Nor would a court compel John Doe to deliver his semen to a physician and mandate artificial insemination of Mary Roe. Matters of custody and adoption after the birth would be determined by the Probate Court as required by law without respect to the proposed agreement. Thus, specific performance of the agreement would not be available to the parties.

Actions for damages would lead the court into a welter of confusing relationships and claims. For example, if Mary Roe after several unsuccessful attempts to accomplish artificial insemination refused to continue, would she be liable to the Does for the incalculable loss of a child not yet conceived? What liability for damages would Mary Roe have if she deliberately terminated her pregnancy, or refused to give up the child to the custody and adoption of the Does after the birth? In the event of an "imperfect" child, could the Does insist that the agreement was breached, or could Mary Roe require adoption by the Does? What damages or orders could ensue if one of the Does insists on custody and adoption while the

other refuses to perform—due to divorce, separation, abandonment, etc? What if either the Does or Mary Roe remove the child from the state and resist participating in any Michigan litigation concerning the child?

Without specific legislative authorization of this type of transaction setting forth the legal rights and obligations of the various parties and the courts of the State, the proposed transaction violates Michigan public policy as set forth in state law.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent urges this Court to deny the Petition for Certiorari, and to impose costs upon Petitioners' counsel under R 33.7 for expenses which they have caused Respondent to incur.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Eugene Krasicky
First Assistant Attorney General

George M. Elworth
Assistant Attorney General

Michael J. Moquin
Assistant Attorney General
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124